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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.N., et al., Persons Coming Under the Juvenile Court Law.	B207754 (Los Angeles County Super. Ct. No. CK58140)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.N., et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County, Debra Losnick, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant M.N.

John L. Dodd & Associates and John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant M.M.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel for Plaintiff and Respondent.

Father M.N. and mother M.M. appeal from an order of the juvenile court terminating their parental rights as to two of their minor children, A.N. and S.N. They argue the court erred in finding the beneficial and sibling relationship exceptions inapplicable. We conclude the order is supported by substantial evidence and affirm.

FACTUAL AND PROCEDURAL SUMMARY

On February 19, 2005, when A.N. was two years old, and his sister, S.N. was six months old, a caller telephoned the Los Angeles Police Department to report that mother had left the children unattended in their apartment while she went out to buy crack cocaine. Police officers entered the apartment through a window and found the children alone, with no food or milk in the refrigerator, no infant formula, and no diapers. Mother returned 20 minutes later. She said that father was in prison. The children were detained and turned over to the Department of Children and Family Services (DCFS) and placed in foster care.

Father was deemed a presumed father.[1] A petition under Welfare and Institutions Code section 300[2] was sustained and the children were declared dependents of the juvenile court on June 30, 2005. Father was ordered to attend counseling, including parenting classes. Mother was ordered to attend individual counseling, parenting classes, drug counseling, and random weekly drug counseling. Mother was given monitored visitation.

Father had no contact with the children between the filing of the petition and September 2007. Mother had one visit between July and December 2005, consistent weekly visits between December 2005 and June 2006, three visits in August 2006, and was whereabouts unknown with no visits between September 2006 and February 2007.

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[1] Ultimately, DNA testing established that father was not the biological father of S.N.

[2] Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

On May 8, 2007, reunification services were terminated for both parents. A permanency planning hearing under section 366.26 was scheduled.

The children had been placed in a new foster home in June 2005. A report prepared by DCFS for the section 366.26 hearing on August 7, 2007, stated that the foster parents wanted to adopt the children and their home study approval was pending. Mother had not visited the children since August 2006. The report was silent as to visitation by father. The home study for the foster parents was approved in August 2007.

The section 366.26 hearing was repeatedly continued. Father began consistent visits in September, October and November 2007, but was not in compliance with the order to complete parenting classes and counseling. Mother did not keep a scheduled visit on December 1, 2007. A report dated March 6, 2008, said that father continued visitation every Saturday, but that mother had only two visits, one in December and one in January 2008. As of May 2008, father's visits were consistent, and mother had had five visits in February and March 2008.

The court terminated parental rights as to both parents on May 1, 2008. It found by clear and convincing evidence that both minors are likely to be adopted. Both mother and father filed timely appeals from this order.

DISCUSSION

I

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination would be detrimental to the child under one of the specific statutory exceptions codified in section 366.26. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206-207.)

Here parents invoke the beneficial relationship exception, now codified in section 366.26, subdivision (c)(1)(B)(i). That exception applies if "termination of parental rights would be detrimental to the child because '[t]he parents . . . have maintained regular

visitation and contact with the minor and the minor would benefit from continuing the relationship.' [Citation.]" (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) The parent bears the burden of proving the exception applies. (*Ibid*.) We review the juvenile court's finding that the beneficial relationship did not apply under the substantial evidence standard. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.)

"[I]nteraction between parent and child will usually confer some incidental benefit to the child. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) To overcome the statutory preference for adoption, the parent must prove he or she occupies a parental role in the child's life resulting in a significant, positive emotional attachment of the child to the parent. (*In re Derek W.*[, *supra*,] 73 Cal.App.4th 823, 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) [¶] When applying the beneficial parent-child relationship exception, the court balances the strength and quality of the parent-child relationship in a tenuous placement against the security and sense of belonging that a stable family would confer on the child. If severing the existing parental relationship would deprive the child of 'a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)" (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1234-1235.)

Both parents argue the juvenile court erred in requiring that they act as parents on a day-to-day basis. The juvenile court said: "As counsel know, these are very difficult cases for this particular court to decide. Having said that and for the parents' benefit, what the law requires me to find is that the parents have acted, in essence, as parents on an almost day-to-day basis in order for me to find that the exception applies. Case law and the 366.[26](c)(1)(B)(i) having monitored visits once a week would clearly not rise to that level. The exception could not be met under the circumstances that have been presented to me."

We agree with parents that evidence of day-to-day contact between dependent children and their parents is not required to establish the beneficial relationship exception. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) But even if the juvenile

court applied the wrong standard, the error was harmless. The evidence before the court was not sufficient to establish that the exception applied.

"Courts have long recognized that, in the context of dependency proceedings, a lack of visitation may 'virtually assure[] the erosion (and termination) of any meaningful relationship' between mother and child." (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504.) Under the beneficial relationship exception codified in section 366.26, a parent may avoid termination of parental rights only if the parent has "maintained regular contact and visitation with [the] child, and the child would benefit from continuing the relationship." (*Id.* at p. 1505*;* see also *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1007.)

Neither parent visited the children on a consistent basis before termination of reunification services. Mother visited the children only once in the first six months of the dependency proceeding. Between September 2006 and November 2007, she had no visits with them. Her visits became consistent only in the three-month period preceding the section 366.26 hearing at which her parental rights were terminated.

Mother argues that while she was found irresponsible in failing to care for the children "there was no showing that she had ever been cruel to the minors or intentionally had harmed them." She also cites evidence that she started a substance abuse treatment program and had been testing clean since October 2007. Mother testified at the section 366.26 hearing that during his first two years of his life, she took care of A.N., bathing him, changing him, feeding him, and caring for him when he was ill. She also argues the same is true as to S.N., who was six months old when removed from mother's custody. During visits, the children call her "Mommy."

Father testified that he cared for A.N. for his first year of life, feeding him and diapering him. Father described visits with A.N. at a park, where father's son E.N., from a different relationship, also was present. According to father, A.N. calls him "Michael Daddy" and calls the foster father "Papa." When asked to describe his visits with A.N., father said, "[M]ainly it's observation and advising him what to do, how to play . . . .

[T]able manners, . . . some supervision." Father testified that he felt very strongly about his relationship with A.N. and that he loves the child.

Father was incarcerated when the children were detained in February 2005. He had no contact with them until the fall of 2007, after reunification services were terminated and they had been placed in the prospective adoptive parents' home for over two years. Neither father nor mother maintained regular contact and visitation with the children until a short time before their parental rights were terminated. There was no showing that severing the parent-child relationship would greatly harm the children. The beneficial parent-child exception does not apply. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

II

Father and mother also argue the juvenile court erred by finding the sibling bond exception to termination of parental rights inapplicable. Section 366.26, subdivision (c)(1)(B) provides an exception to termination of parental rights where: "The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: . . . [¶] (v) There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption."

"[T]he application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount." (*In re Valerie A.*, *supra*, 152 Cal.App.4th at p. 1014.) The parent has the burden of showing that a sibling relationship exists and that its severance would be detrimental to the child. (*In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1017.) We review the juvenile court's determination on the applicability of this exception for substantial evidence. (*Ibid.*)

In *In re Valerie A., supra,* 152 Cal.App.4th 987, the court found the sibling bond exception did not apply. In that case, the dependent twins were a little over one year old when removed from their mother's custody. An older half sibling, A.G., had been adopted by the maternal grandmother in an earlier dependency proceeding. The twins lived in the same home with A.G. for a few months, then they were placed in another foster home. A.G. was allowed visits with the twins twice a month. The Court of Appeal reasoned that the children were raised together in the same home for a relatively short time; and that as infants and toddlers, the experiences they shared with A.G. would not be as meaningful to them as they were to A.G. It concluded: "Even though [A.G.'s] interactions with the children were loving, affectionate, playful and nurturing, the court reasonably could determine the children's long-term emotional interests, due to their ages and needs, were better served by the permanency of adoption rather than by continued sibling contact." (*Id.* at p. 1013.)

Here, father had a son, E.N., six years old, who accompanied him on visits with A.N. E.N. had lived with father for about a year, but never had lived with A.N. While they were very young, A.N. and E.N. sometimes spent the night together, but father admitted, "I don't think they remember each other." E.N. and A.N. played together during visits. A.N. referred to E.N. as his brother. Father thought that A.N. did not remember earlier visits with E.N, almost three years before. Father did not mention visits between S.N. and E.N.

Mother had older children, C. and R.[3] who were 13 and 15 years old. They had joined their grandmother in visiting the minors according to a DCFS report dated August 7, 2007. The number and nature of these visits was not described. At the section 366.26 hearing, mother testified that she brought the two older children on her visits when they resumed in 2008. She testified that A.N. and S.N. always wanted to see their half siblings. She said that A.N. knows that C. and R. are his siblings, and has a close relationship with R. Mother testified that A.N. and R. are into electronics and talk about

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3 R. was also sometimes referred to as "C."

that, and play video games. R. explains things to A.N. When A.N. sees R., "he's ecstatic." A.N. runs to R., hugs and kisses him. A.N.'s relationship with C. was the same. When visits end, A.N. does not want to let go of R.'s hand.

This evidence is not sufficient to establish the applicability of the sibling bond exception. As in *In re Valerie G.*, *supra*, 152 Cal.App.4th 987, the brief duration of visits between the minors and their half siblings was not sufficient to establish that it was in the best interest of the minors to maintain the sibling relationship rather than the stable placement in which they had lived for nearly three years. Although there was some bond between A.N. and his half siblings, substantial evidence supports the juvenile court's conclusion that the benefits of legal permanence through adoption by the foster parents who had cared for the minors for two years outweighed their need for more frequent contact with their siblings.

DISPOSITION

The order terminating the parental rights of father and mother is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.